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## **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1954**

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**No. 29**

**THE UNITED STATES, PETITIONER**

**vs.**

**KOPPERS COMPANY, INC., SUCCESSOR ON MERGER  
TO KOPPERS UNITED COMPANY AND SUBSIDI-  
ARIES**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
CLAIMS**

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**PETITION FOR CERTIORARI FILED MARCH 1, 1954**

**CERTIORARI GRANTED MAY 17, 1954**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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No. 609

THE UNITED STATES, PETITIONER,

vs.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF CLAIMS

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1

## In the United States Court of Claims

No. 78-52

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed February 18, 1952

To the Honorable, The Judges of the United States Court of Claims:

The petition of Koppers Company, Inc., Successor on Merger to Koppers United Company and Subsidiaries, a corporation organized and existing under the laws of the State of Delaware, with principal office in the Koppers Building, Pittsburgh, Pennsylvania, respectfully represents:

I

This is an action arising under the Internal Revenue Laws of the United States and is brought pursuant to Sections 322 and 3772 of the Internal Revenue Code (Title 26, USCA) and Section 2 1491 of the Judicial Code (Title 28, USCA). The plaintiff seeks to recover from the United States the sum of \$273,-143.19, together with interest thereon as provided by law, which sum represents an overpayment of interest for the calendar years 1940 and 1941 on alleged deficiencies in excess profits taxes for those years.

II

(a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The amended return for 1940 disclosed thereon excess profits net income of \$3,653,890.77, an excess profits credit of \$3,623,876.29 and an excess profits tax liability of \$6,512.76. The tax for 1940 was paid to the Collector at Pittsburgh, \$3,000.00 on March 15, 1941, \$3,000.00 on June 13, 1941, and \$512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The amended return for 1941 disclosed thereon excess profits net income of \$6,545,206.33, an excess profits credit of \$3,494,726.10 and an

excess profits tax liability of \$1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

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## III

Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies were included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

## IV

By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

## V

On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of \$6,000.00 of the excess profits tax paid for 1940. On or about September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from \$6,000.00 to \$22.56. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code,  
4 claiming thereon a refund of \$1,781,288.14 of the excess profits tax paid for 1941. On or about November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from \$1,781,288.14 to \$541,103.86.

## VI

On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was \$2,801,598.22, and for the year 1941 was \$3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

## VII

At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of Revenue Agents' Reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which there were proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Excess profits net income proposed 1940	Excess profits credit proposed 1940	Deficiency in ex- cess profits tax proposed 1940
Sept. 23, 1946.....	\$4,158,504.30	\$2,612,509.89	\$710,753.85
Mar. 1, 1949.....	5,513,895.44	2,256,809.26	594,385.50
Feb. 9, 1951.....	3,280,942.26	2,661,518.31	260,554.39

5 The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, I.R.C., as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1940 to \$2,661,518.31, resulting in a decrease in the deficiency in excess profits tax proposed to \$260,554.39.

## VIII

At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of Revenue Agents' Reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1941 in which there were proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Excess profits net income proposed 1941	Excess profits credit proposed 1941	Deficiency in ex- cess profits tax proposed 1941
Apr. 29, 1949.....	\$6,102,978.68	\$2,576,117.11	\$272,078.42
Feb. 9, 1951.....	6,353,492.13	3,143,429.68	95,749.33

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, I.R.C., as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to \$3,143,429.68, resulting in a decrease in the deficiency in excess profits tax proposed to \$95,749.33.

## 6

## IX

On February 14, 1951, the plaintiff, as successor on merger to Koppers United Company, filed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Over-assessment", agreeing to the proposed deficiency of \$260,554.39 for 1940 and to the proposed deficiency of \$95,749.33 for 1941. On

March 8, 1951, the Commissioner issued a formal notice by registered mail to Koppers United Company and Subsidiary Companies, c/o Koppers Company, Inc., in which he determined deficiencies in excess profits tax for these companies for 1940 and 1941 in the amounts of \$260,554.39 and \$95,749.33, respectively.

## X

These deficiencies, together with interest of \$217,376.07 for 1940 and \$230,504.86 for 1941, were assessed against Koppers United Company and Subsidiaries, Koppers Company, Inc., successor on merger, on the April 17, 1951 special assessment list #4 for the 23rd District of Pennsylvania. The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed, as shown by the following comparison of the basis upon which the interest was computed and the basis upon which the deficiency in excess profits tax was determined and assessed by the Commissioner:

	1940	
	Basis for Computation of Interest Assessment	Basis for Computation of Deficiency as Determined by Commissioner on March 8, 1951
Excess Profits net income.....	\$3,280,942.26	\$3,280,942.26
Less: Specific exemption.....	\$ 10,000.00	\$ 5,000.00
Excess profits credit.....	<u>\$2,256,809.26</u>	<u>\$2,661,518.31</u>
Total.....	<u>\$2,266,809.26</u>	<u>\$2,666,518.31</u>
Remainder-Adjusted excess profits net income.....	<u>\$1,014,133.00</u>	<u>\$ 614,423.95</u>
Tax on \$20,000.00 at 25%.....	\$ 5,000.00	\$ 5,000.00
Tax on \$30,000.00 at 30%.....	9,000.00	9,000.00
Tax on \$50,000.00 at 35%.....	17,500.00	17,500.00
Tax on \$150,000.00 at 40%.....	60,000.00	60,000.00
Tax on \$250,000.00 at 45%.....	112,500.00	112,500.00
Tax on \$514,133.00 at 50%.....	257,066.50	.....
Tax on \$114,423.95 at 50%.....	.....	57,211.98
Excess profits tax.....	\$ 461,066.50	\$ 261,211.98
Amount due to application of Section 734, I. R. C.....	5,855.17	5,855.17
Excess Profits tax liability.....	<u>\$ 466,921.67</u>	<u>\$ 267,067.15</u>
Previous assessment.....	<u>6,512.76</u>	<u>6,512.76</u>
Additional Excess Profits Tax.....	<u>\$ 460,408.91</u>	<u>\$ 260,554.39</u>
Interest computed and assessed on this additional excess profits tax—6% on \$460,408.91 from 3/15/41 to 1/28/49.....	<u>\$ 217,376.07</u>	

	Basis for Computation of Interest Assessment	Basis for Computation of Deficiency as Determined by Commissioner on March 8, 1951
Excess profits net income . . . . .	\$6,353,492.13	\$6,353,492.13
Less: Specific exemption . . . . .	\$ 5,000.00	\$ 5,000.00
Excess profits credit . . . . .	2,576,117.11	3,143,429.68
Total . . . . .	\$2,581,117.11	\$3,148,429.68
Remainder—Adjusted excess profits net income . . . . .	\$3,772,375.02	\$3,205,062.45
Tax on \$20,000 at 35% . . . . .	\$ 7,000.00	\$ 7,000.00
Tax on \$30,000 at 40% . . . . .	12,000.00	12,000.00
Tax on \$50,000 at 45% . . . . .	22,500.00	22,500.00
Tax on \$150,000 at 50% . . . . .	75,000.00	75,000.00
Tax on \$250,000 at 55% . . . . .	137,500.00	137,500.00
Tax on \$3,272,375.02 at 60% . . . . .	1,963,425.01	1,623,037.47
Tax on \$2,705,062.45 at 60% . . . . .	.....	.....
Excess profits tax . . . . .	\$2,217,425.01	\$1,877,037.47
Less—Credit for foreign taxes . . . . .	9,405.92	.....
Excess profits tax liability . . . . .	\$2,208,019.09	\$1,877,037.47
Previous assessment . . . . .	\$1,781,288.14	\$1,781,288.14
Additional excess profits tax . . . . .	\$ 426,730.95	\$ 95,749.33
Interest computed and assessed on this additional excess profits tax—6% on \$426,730.95 from 3/15/42 to 3/16/51 . . . . .	.....	.....
	\$ 230,504.86	.....

**XI**

On April 19, 1951, the Collector at Pittsburgh sent to the plaintiff, successor on merger to Koppers United Company, a notice on Treasury Department Form 7658 entitled "Statement of Income Tax Due". The statement demanded payment of excess profits tax of \$260,554.39 for 1940, which was offset on the statement by a credit of the same amount opposite a notation "1/28/49 rec'd".

9     The statement also demanded the payment of interest for 1940 of \$217,376.07.

**XII**

The plaintiff paid the interest of \$217,376.07, so assessed, to the Collector at Pittsburgh on April 24, 1951.

**XIII**

Also on April 19, 1951, the Collector at Pittsburgh sent to the plaintiff, successor on merger to Koppers United Company, a notice on Treasury Department Form 7658 entitled "Statement of Income Tax Due". This statement demanded payment of excess profits

tax of \$95,749.33 for 1941 and interest of \$230,504.86. The plaintiff used certain overassessments of \$83,277.55, the source of which is not material here, as a credit against the deficiency in excess profits tax for 1941 of \$95,749.33, leaving a balance due of \$12,471.78.

#### XIV

The plaintiff paid the balance of the 1941 excess profits tax of \$12,471.78, together with interest of \$230,504.86, to the Collector at Pittsburgh on April 24, 1951.

#### XV

On June 29, 1951, the plaintiff filed with said Collector claims for refund on Form 843 for interest on excess profits tax for the calendar year 1940 in the amount of \$94,358.71 and for the calendar year 1941 in the amount of \$178,784.48, or such greater amounts as are legally refundable. These claims were based on Section 292(a) of the Internal Revenue Code (Title 26, USCA) which provides for the assessment and collection of "Interest upon

10 the amount determined as a deficiency \* \* \*." The amounts

here determined and assessed as deficiencies in excess profits tax for 1940 and 1941 were \$260,554.39 and \$95,749.33 respectively. Interest to the extent of \$123,017.36 was properly assessed on the deficiency for 1940 (6% on \$260,554.39 from 3/15/41 to 1/28/49), and interest to the extent of \$51,720.38 was properly assessed on the deficiency for 1941 (6% on \$95,749.33 from 3/15/42 to 3/16/51). The remaining interest, \$94,358.71 for 1940 and \$178,784.48 for 1941, was computed on alleged deficiencies which were never determined or assessed, and said interest in the total amount of \$273,143.19 therefore was erroneously and illegally collected by the Collector. (*Henry River Mills Company v. The United States*, 119 Ct. Cls. —, (April 3, 1951) 96 F. Supp. 477, 5-1 U.S.T.C. 9225.)

#### XVI

On December 13, 1951, the Commissioner of Internal Revenue sent the plaintiff by registered mail a statutory notice of the disallowance of said claims for refund.

#### XVII

By reason of the foregoing the defendant has illegally and erroneously refused to refund to the plaintiff the said amount of \$273,143.19 together with interest as provided by law.

#### XVIII

The plaintiff is the owner of this claim and there has been no assignment or transfer of it or any part thereof.

11-12

## XIX

WHEREFORE, the plaintiff prays for a judgment against the United States of America on the facts and the law for the sum of \$273,-143.19, with interest thereon as provided by law; for its reasonable costs and disbursements herein; and for such other and further relief in the premises as may be just.

DAVID W. RICHMOND,  
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Washington 5, D. C.,  
Attorney for Plaintiff.

*Of Counsel:*

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*Koppers Building,*  
*Pittsburgh, Pennsylvania.*

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In the United States Court of Claims

[Title omitted]

ANSWER—Filed October 1, 1952

The defendant herein, the United States of America, by and through its Acting Assistant Attorney General, answers plaintiff's petition as follows:

I. Admits the allegations in paragraph I, except to deny that the sum therein stated represents an overpayment of interest on alleged deficiencies in excess profits taxes for the calendar years 1940 and 1941.

II. Admits the allegations in paragraphs II through XVI, excepting only the allegations in the last sentence beginning on 14 line 10 and ending on line 15 of paragraph XV, reading:

The remaining interest, \$94,358.71 for 1940 and \$178,784.48 for 1941, was computed on alleged deficiencies which were never determined or assessed, and said interest in the total amount of \$273,143.19 therefore was erroneously and illegally collected by the Collector.

It is admitted that the deficiencies never were assessed, but the remaining allegations in the quoted excerpt are specifically denied for

the reason that, at the time the overassessments of excess profits tax for the years 1940 and 1941 were determined, the Commissioner of Internal Revenue also determined that, immediately prior to an allowance of relief under Section 722 of the Internal Revenue Code, the taxpayer was liable for additional excess profits taxes for 1940 and 1941 and for interest thereon.

III. Denies the allegations in paragraph XVII.

IV. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XVIII.

As an additional defense in the nature of a set-off, defendant alleges that the Commissioner of Internal Revenue for the years 1940 and 1941, as to which consolidated excess profits tax returns were filed, determined and paid to other corporations in the consolid-  
15-16 dated group interest aggregating \$2,926.85, and, if plaintiff is entitled to recover the amount of \$273,143.19 claimed in its petition, then that amount should be reduced by the sum of \$2,926.85 and judgment entered for the difference.

WHEREFORE, defendant prays that plaintiff take nothing from it in this suit, and that the same be dismissed with costs against the plaintiff.

CHARLES S. LYON,  
*Acting Assistant Attorney General.*

JOHN A. REES,  
*Attorney.*

[Title omitted]

FIRST AMENDED ANSWER—Filed October 17, 1952

The defendant herein, the United States of America, by and through its Assistant Attorney General, amends the answer which it filed on October 1, 1952, by deleting that portion of paragraph II on page 14, consisting of 11 lines, following the indented excerpt from paragraph XV of plaintiff's petition, and in lieu thereof inserts the following:

These allegations are denied and in this connection it is alleged that facts set forth in paragraphs IX and X of the petition and already admitted in this answer show that interest of \$217,376.07  
for 1940 and \$230,504.86 for 1941 was computed and assessed  
18 on additional excess profits tax of \$460,408.91 for 1940 and  
\$426,730.95 for 1941, and also show that of these additional  
taxes portions only—\$260,554.39 for 1940 and \$95,749.33 for 1941—  
were assessed as deficiencies. The defendant also alleges that defi-  
ciencies were determined of \$460,408.91 for 1940 and of \$426,730.95

for 1941; that the portions thereof which were not assessed were extinguished by the allowance of excess profits credits which resulted from the relief allowed by the Excess Profits Tax Council—as alleged in paragraphs VII and VIII of the petition and admitted in this answer—; that interest of \$217,376.07 on the determined deficiency of \$460,408.91 was assessed for the period beginning March 15, 1941, which was the due date of the 1940 return, to January 28, 1949, which was the date the sum of \$260,554.39 was paid; and that interest of \$230,504.86 on the determined deficiency of \$426,730.95 was assessed for the period beginning March 15, 1942, which was the due date of the 1941 return, to March 16, 1951, which was 30 days after the plaintiff filed a certain waiver as alleged in paragraph IX of the petition.

CHARLES S. LYON,  
Assistant Attorney General.

JOHN A. REES,  
*Attorney.*

#### 19-20 PROCEEDINGS FOLLOWING FILING OF DEFENDANT'S ANSWERS

On October 20, 1952, plaintiff filed a motion for judgment on the pleadings.

On November 19, 1952, defendant filed a response to plaintiff's motion for judgment on the pleadings.

On January 9, 1953 defendant filed a motion for a summary judgment.

On January 12, 1953, plaintiff's motion for judgment on the pleadings and defendant's motion for summary judgment were withdrawn in open court and the case remanded to Commissioner Akers for further proceedings.

#### 21 In the United States Court of Claims

[Title omitted]

#### REPORT OF COMMISSIONER—Filed February 4, 1953

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the following determination and report of the facts is submitted:

1. (a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal

Revenue, Pittsburgh, Pennsylvania. The return for 1940 disclosed thereon excess profits net income of \$3,656,110.35, an excess profits credit of \$3,864,935.25, and showed no tax due. The amended return for 1940 disclosed thereon excess profits net income of \$3,653,890.77, an excess profits credit of \$3,623,876.29, an adjusted excess profits net income of \$25,014.48, and an excess profits tax liability of \$6,-512.76. The tax for 1940 was paid to the Collector at Pittsburgh, \$3,000 on March 15, 1941, \$3,000 on June 13, 1941, and \$512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942,  
with the Collector of Internal Revenue, Pittsburgh, Penn-  
22 sylvania. The return for 1941 disclosed thereon excess profits net income of \$6,613,646.26, an excess profits credit of \$3,-494,726.10, an adjusted excess profits net income of \$3,113,920.16, and an excess profits tax liability of \$1,822,352.10. The amended return for 1941 disclosed thereon excess profits net income of \$6,-545,206.33, an excess profits credit of \$3,494,726.10, an adjusted excess profits net income of \$3,045,480.23, and an excess profits tax liability of \$1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

(c) The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code.

2. Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies was included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

3. By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

4. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of \$6,000 of the excess profits tax paid for 1940. On September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from \$6,000 to \$22.56. On September 15, 1943, Koppers United Company, as parent of the

consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of \$1,781,288.14 of the excess profits tax paid for 1941. On November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from \$1,781,288.14 to \$541,103.86.

5. On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was \$2,801,598.22, and for the year 1941 was \$3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

6. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which he proposed excess profits net income, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1940	Proposed excess profits credit 1940	Proposed deficiency in excess profits tax—1940
Sept. 23, 1946	\$4,158,504.30	\$2,612,509.89	\$740,753.85
Mar. 1, 1949	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951	3,280,942.26	2,661,518.31	260,554.39

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1940 to \$2,661,518.31, resulting in a decrease in the proposed deficiency in excess profits tax to \$260,554.39.

7. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1941 in which he proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1941	Proposed excess profits credit 1941	Proposed deficiency in excess profits tax—1941
Apr. 29, 1949	\$6,102,978.68	\$2,576,117.11	\$272,078.42
Feb. 9, 1951	6,353,492.13	3,143,429.68	95,749.33

The letter dated February 9, 1951 reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to \$3,143,429.68, resulting in a decrease in the proposed deficiency in excess profits tax to \$95,749.33.

8. Thereafter and on February 14, 1951, the plaintiff executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of \$260,554.39 and \$95,749.33.

9. In computing the proposed deficiencies set out in the preceding findings, the Commissioner, in accordance with the administrative practice of the Internal Revenue Bureau, first computed the excess profits tax liability for each of the years 1940 and 1941 without the allowance of any relief provided by Section 722. At that time, February 26 and February 27, 1951, an agreement had been reached between the parties, as shown in findings 6 and 7, both as to the amount of taxable net income and the amount of relief allowable under Section 722. Those computations showed the following results:

	1940	1941
Excess profits net income	\$3,289,942.26	\$6,353,492.13
Excess profits credit	2,261,809.26	2,576,117.11
Adjusted excess profits net income	1,011,133.00	3,772,375.02
Excess profits tax before application of Section 722	466,921.67	2,208,019.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.14
Excess profits tax before application of Section 722 but after allowing credit for payments made with return	460,408.91	426,730.95

25      10. After the computations referred to in the preceding findings had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 from \$466,921.67 to \$267,067.15, that is, in the amount of \$199,854.52, and for 1941 from \$2,208,019.09 to \$1,877,037.47, that is, in the amount of \$330,981.62. Against the amounts so reduced he gave credit for the excess profits tax reported and paid in the same manner as in the previous computations, that is, \$6,512.76 for 1940 and \$1,781,288.14 for 1941. After the allowance of these credits there was shown a balance of excess profits tax due for 1940 of \$260,554.39 and for 1941 of \$95,749.33. On March 8, 1951, the Commissioner issued his statutory notice of a determination of deficiencies in the amounts just stated, such notice reading in part as follows:

You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, \* \* \* discloses deficiencies of \$260,554.39, \$95,749.33, \* \* \* respectively.

No similar notice was given by the Commissioner with respect to the results of his computation of the excess profits tax liability before the application of Section 722.

11. The Bureau of Internal Revenue computed interest for the years 1940 and 1941 as follows: for the year 1940, interest in the sum of \$217,376.07 was computed upon \$460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of \$260,554.39); and for the year 1941, interest in the sum of \$230,504.86 was computed upon \$426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to **March 16, 1951 (which was thirty days after the waiver referred to in finding 8 was filed)**.

12. On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits tax of \$260,554.39 for 1940 and \$95,749.33 for 1941 and at the same time assessed interest of \$217,376.07 for 1940 and \$230,504.86 for 1941. These amounts of tax and interest were paid in full by the plaintiff to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand.

26 13. On June 29, 1951, the plaintiff timely filed a formal claim for refund of part of the interest which had been assessed and paid for the years 1940 and 1941, as stated above. It claimed refunds of \$94,358.71 for 1940 and \$178,784.48 for 1941, or such greater amounts as legally might be due. Each claim for refund set forth as a ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292 (a) of the Internal Revenue Code. Each claim said in part:

The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed.

The plaintiff concedes that the remaining interest to the extent of \$123,017.36 was properly assessed on the deficiency for 1940 (six percent on \$260,554.39 from 3/15/41 to 1/28/49) and that the remaining interest to the extent of \$51,720.38 was properly assessed on the deficiency for 1941 (six percent on \$95,749.33 from 3/15/42 to 3/16/51).

14. On December 13, 1951, the Commissioner sent to the plaintiff by registered mail a statutory notice of disallowance of each of its claims for refund.

15. The plaintiff concedes that the set-off in the amount of \$2,926.85, alleged by the defendant in paragraph IV of its Answer, is a proper set-off, and that if it is entitled to recover the amount of \$273,143.19 claimed in its petition, then that amount should be reduced by the sum of \$2,926.85 and judgment entered for the difference.

Respectfully submitted.

RICHARD H. AKERS,  
*Commissioner.*

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**ARGUMENT AND SUBMISSION OF CASE**

On May 7, 1953, the case was argued and submitted on the merits by Mr. David W. Richmond for the plaintiff and by Mrs. Elizabeth B. Davis and Mr. John E. Garvey for the defendant.

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**In the United States Court of Claims**

No. 78-52

**KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED  
COMPANY AND SUBSIDIARIES,**

v.

**THE UNITED STATES**

**Opinion of the Court by Littleton, Judge, Findings of Fact  
and Conclusion of Law—December 1, 1953**

Mr. David W. Richmond for the plaintiff. Messrs. Frederick O. Graves, Miller & Chevalier, E. S. Ruffin, Jr., and C. M. Crick, were on the brief.

Mrs. Elizabeth B. Davis and Mr. John E. Garvey, with whom was Mr. Assistant Attorney General H. Brian Holland, for the defendant. Messrs. Andrew D. Sharpe and Ellis N. Slack were on the brief.

LITTLETON, Judge, delivered the opinion of the court:

Plaintiff sues to recover \$273,143.19, plus interest, claiming that such amount represents an illegal collection and overpayment of interest on "potential" excess profits tax deficiencies of \$199,854.52 and \$330,981.62 for the years 1940 and 1941, respectively. These "potential" deficiencies, which under the law and the facts of plaintiff's case for the years involved, the plaintiff was never required to pay, and which, at the time they were computed could not be legally collected, represents the amounts of excess profits tax which plain-

tiff would have been required to pay had it not been entitled under the facts and the law to have its excess profits tax for the years mentioned determined, computed and assessed under and in accordance with the provisions of Section 722 of the Internal Revenue Code (26 U. S. C. 722; 54 Stat. 986, as amended. Repealed November 8, 1945, 59 Stat. 568).

The issue presented is whether the assessment and collection of interest on such "potential" deficiencies was proper under a proper interpretation of the taxing statutes as applied to the facts  
30 of this case. These facts are not in dispute and are summarized below.

Plaintiff<sup>1</sup> filed excess profits tax returns for the calendar years 1940 and 1941 on the dates and reflecting the computations set out in the tabulation below:

	Excess profits net income	Excess profits credit	Adjusted excess profits net income	Excess profits tax liability
1940 return filed 9-15-41.	\$3,656,110.35	\$3,864,935.25	.....	.....
Amended 1940 return, filed 7-21-44.....	3,653,890.77	3,623,876.29	\$25,014.48	\$6,512.76
1941 return filed 6-15-42.	6,613,646.26	3,494,726.10	3,113,920.16	1,822,352.10
Amended return 1941, filed 6-20-42.....	6,545,206.33	3,494,726.10	3,045,480.23	1,781,288.14

The tax for 1940 was paid in installments of \$3,000 on March 15, 1941; \$3,000 June 13, 1941, and \$512.75 July 21, 1944. The tax for 1941 was paid quarterly during 1942.

On September 15, 1943, plaintiff filed, pursuant to law, applications for determination and assessment of its profits tax under the provisions of the Internal Revenue Code, claiming, at the same time, refunds of \$6,000 of the excess profits tax paid for 1940, and \$1,781.288.14 of such tax paid for 1941. The claim for 1940 was reduced to \$22.56 by an amended application filed September 10, 1945, and the 1941 claim was lowered to \$541,103.86 by an amended application of November 20, 1945. By timely consents filed, the plaintiff and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company, as parent of the consolidated group, for 1940 and 1941, might be assessed at any time on or before June 30, 1951.

The differences between the plaintiff and the Commissioner of

<sup>1</sup> Koppers Company, Inc., is successor by merger of Koppers United Company and its subsidiaries, which filed consolidated excess profits tax returns for 1940 and 1941. Although the merger did not occur until November 10, 1944 (finding 2), as a matter of convenience we shall refer to the taxpayer as "plaintiff" without regard to the corporate structure at any particular time.

Internal Revenue with respect to their respective claims were not reconciled until December 16, 1950, on which date plaintiff executed  
 31 an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1), in which the constructive average base period net income for 1940 and 1941 was set out as \$2,801,598.22 and \$3,394,944.93, respectively. These amounts so determined and agreed to were approved by the Excess Profits Tax Council, Bureau of Internal Revenue, on January 10, 1951.

At various times the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, forwarded to plaintiff copies of reports concerning examination of plaintiff's excess profits tax returns in which were proposed excess profits net income, excess profits credits and deficiencies in excess profits tax for 1940 and 1941, as follows:

	1940		
Date of transmittal letter	Proposed excess profits net income	Proposed excess profits credit	Proposed deficiency in excess profits tax
Sept. 23, 1946.....	\$4,158,504.30	\$2,612,509.89	\$710,753.85
Mar. 1, 1949.....	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951.....	3,280,942.26	2,661,518.31	260,554.39

  

	1941		
Date of transmittal letter	Proposed excess profits net income	Proposed excess profits credit	Proposed excess profits tax deficiency
Apr. 29, 1949.....	\$6,102,978.68	\$2,576,117.11	\$272,078.42
Feb. 9, 1951.....	6,353,492.13	3,143,429.68	95,749.33

The letters of February 9, 1951, reflected the agreement reached with respect to the determination, computation and assessment of the tax under Section 722, *supra*, as determined by the Excess Profits Tax Council.

Plaintiff executed and filed a waiver (Form TF 874) on February 14, 1951, consenting *inter alia* to the assessment and collection of deficiencies in its excess profits tax for 1940 and 1941, in the respective amounts of \$260,554.39 and \$95,749.33. In determining these deficiencies, the Commissioner first computed the excess profits tax for each of the years without regard to Section 722. However, at that time (February 26 and 27, 1951) a written agreement had been

32 executed by the parties, both as to the amount of taxable net income and the amount of tax liability under Section 722.

The results of the Commissioner's computations are reflected below:

	1940	1941
Excess profits tax net income	\$3,280,942.26	\$6,353,492.13
Excess profits credit	2,261,809.26	2,576,117.11
Adjusted excess profits net income	1,014,133.00	3,772,375.02
Excess profits tax before application of §722	466,921.67	2,208,019.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.11
Excess profits tax before determination under §722, but after allowing credits for pay-		
	160,108.01	426,730.95

After the above calculations had been made, the Commissioner gave effect to the determination of the tax under Section 722 (\$199,-854.52 for 1940 and \$330,981.61 for 1941), which made the excess profits tax liability determined and collectible those amounts rather than the *computed* but uncollectible amounts of \$460,408.91 and \$426,730.95. On March 8, 1951, the Commissioner issued his statutory notice of deficiencies, which read in part, as follows:

You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941,  
\* \* \* discloses deficiencies of \$260,554.39, \$95,749.33 \* \* \* respectively.

No such notice was given by the Commissioner with respect to his computation of the excess profits tax other than the above quoted deficiency notice under Section 722. However, when the Bureau of Internal Revenue came to the computation of interest, such interest was computed on an excess profits tax *computed* by the Bureau without regard to the facts of plaintiff's case and the provisions of Section 722. This resulted in interest amounts of \$217,376.07 for 1940 on \$460,408.91, from March 15, 1941, to January 28, 1949 (this date was treated as the date of payment of the determined deficiency of \$260,554.39), and of \$230,504.86 for 1941 on \$426,-730.95, from March 15, 1942, to March 16, 1951 (the last mentioned date being thirty days after the waiver of February 14, 1951, was filed).

When the Commissioner, pursuant to the waiver of February 14, 1951, assessed deficiencies in excess profits taxes of \$260,554.39 for 1940 and \$95,749.33 for 1941, on April 17, 1951, interest in the  
33 amounts indicated above was also assessed. These amounts were paid by plaintiff under protest.

It is plaintiff's position that its liability for interest extends only to such interest as results from computations on the amounts of the deficiencies actually determined and assessed (\$260,554.39 for 1940 and \$95,749.33 for 1941) rather than that resulting from computations based on the entire amounts of the potential deficiencies, that is, \$460,408.91 for 1940 and \$426,730.95 for 1941, which it would have had to pay but for the applicability of Section 722. Claims for refunds of the difference between interest on the actual deficiencies assessed and the potential deficiencies were timely filed with the Bureau and formally denied. The amounts claimed were \$94,-358.71 for 1940 and \$178,784.48 for 1941. It is for recovery of the sum of these amounts (\$273,143.19) that plaintiff now sues.

The determination of the propriety of the Commissioner's action in assessing interest on the potential deficiencies, described above, calls for the construction of Sections 292 (a) and 271 of the Internal Revenue Code, as well as some consideration of the nature and role

of Section 722 in the excess profits tax scheme. The quotation of the pertinent language of Sections 292 (a) and 271 may be helpful in presenting the issues involved since they represent the statutory authority for the assessment of interest on taxes.

#### § 292 (a) INTEREST ON DEFICIENCIES

(a) **GENERAL RULE.** Interest upon the amount *determined* as a *deficiency* shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of six per centum per annum \* \* \*. [Italics supplied.]

#### § 271 DEFINITION OF DEFICIENCY

(a) **IN GENERAL.** As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds \* \* \* the amount shown as the tax by the taxpayer upon his return \* \* \*.

The defendant contends that a "deficiency," as that term is used in the above provisions, existed in the amount on which interest was collected from the date of the return, and that while the application of Section 722 and the determination of the tax thereunder, "extinguished" part of this amount it did not "extinguish" the interest thereon. In this connection it is urged that insofar as interest is concerned, no distinction should be made between a net operating loss carry-back situation and the application of Section 722.

For the reasons which follow, we do not agree.

The excess profits tax, as imposed by the Revenue Act of 1940 as amended,<sup>2</sup> was in essence a tax on those corporate earnings which exceeded the profits realized under normal economic conditions, not stimulated by war or defense spending. To determine what profits were to be subjected to the tax, rather complex formulae were provided by which the so-called "normal" profits were calculated and denominated the "excess profits credit." The difference between the "excess profits credit" and the earnings for a particular year was the amount subjected to the tax. One of the factors employed in calculating the excess profits credit was the average of the annual profits realized during a group of representative years (1936-1939) called the "base period." The result was termed "average base period net income."<sup>3</sup>

<sup>2</sup> 54 Stat. 975, 26 U. S. C. §§ 710-752; 26 U. S. C. (Supp. IV), §§ 710-783. Repealed Nov. 8, 1945, 59 Stat. 568.

<sup>3</sup> We are aware that other elements were included in the determination of average base period net income and that the "normal

It is unnecessary to go into the many ramifications of excess profits tax computations to realize that if, for any of numerous possible reasons this average base period net income did not in fact reflect the earning norm of a corporation, the entire scheme of computation would be frustrated and gross inequities in the administration of the tax would result. It was in recognition of this possibility, or indeed this fact, that Section 722 was added to the Internal Revenue Code. This section provides in part as follows:

In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base

period net income for the purposes of an excess profits  
35 tax based upon a comparison of normal earnings and  
earnings during an excess profits tax period, the tax shall be *determined* by using such constructive average base period net income *in lieu* of the average base period net income otherwise determined under this subchapter. \* \* \* [Italics supplied.]

It should be immediately emphasized here that given the fact situation contemplated by this section and compliance by the taxpayer with the procedural necessities of application to the Commissioner, as required by the statute, and proof that excess profits tax (exclusive of Section 722) is excessive or discriminatory and establishes what would be a fair and just amount representing normal earnings, the constructive average base period net income was to be used *in lieu of* the average base period net income to *determine the tax*, rather than to merely *offset* the result of computations based on the latter.

The defendant would make no such distinction. Its argument is, in effect, that while the "*constructive* average base period net income" should be employed to determine the amount of the tax, the "*average base period net income*" must be the basis of interest computations, although such computation is on an amount which the statute itself calls "excessive" and "discriminatory."

We see no justification for such a construction. A review of the history and purpose of Section 722 convinces us that it is merely a refinement of the basic policy embodied in the excess

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profit" is not entirely synonymous with "excess profit credit," but for illustrative purposes this statement is substantially correct. This treatment of the excess profits tax scheme is admittedly an oversimplification, and it is indulged in only by way of placing the purpose of Section 722 into proper perspective.

profits tax scheme and not a departure from it.<sup>4</sup> It affords an alternative formula for determining the amount to be exacted when the economic facts of a particular corporation will 36 not fit properly into the "average base period net income" mechanism. The result sought is a fair and equitable tax *in lieu of*, not *in mitigation of*, an excessive and discriminatory one. It follows therefore that where the factual and procedural requirements of Section 722 have been met, the Commissioner must take cognizance of that section in "determining" a "deficiency," as those terms are used in Sections 292(a) and 271. In so doing the constructive average base period net income must of necessity be used in arriving at the basis on which interest is computed as for the determination and assessment of the tax itself. Once Section 722 is, on the facts established, brought to bear on an appropriate situation it is an integral part of the applicable tax law and cannot be employed eclectically by the Commissioner of Internal Revenue.<sup>5</sup> The result in the factual situation of the instant case is that there were no deficiencies for 1940 and 1941, within the meaning of the interest provisions of Section 292, on which interest could properly be determined and assessed, other than the deficiencies to which plaintiff consented, which the Commissioner, on the applicable facts and the law determined and assessed, and which the taxpayer paid for 1940 and 1941. This was our decision in *Henry*

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<sup>4</sup> In a study of the development of legislation dealing with excess profits taxation, one writer has made the following comment on "Relief" provisions which is especially applicable to Section 722: "The term 'relief,' however, is probably a misnomer. The provisions in question are more properly to be called refinements of either the income or credit computations. They are not acts of grace operating in defiance of the excess profits concept, but perfecting amendments in furtherance of basic policy." Peterson, "The Statutory Evolution of the Excess Profits Tax," 10 *Law and Contemporary Problems* 3 (1943-44). Likewise, the Committee Reports dealing with Section 722 support the position that this section's purpose was the equitable application of the same basic tax to variant economic situations. See: H. Rept. No. 146, S. Rept. No. 75, on H. R. 3531 [Excess Profits Tax Amendments 1941], 77th Cong. 1st Sess.; H. Rept. No. 2333, S. Rept. No. 1631 [Revenue Bill of 1942], 77th Cong. 2d Sess.

<sup>5</sup> Defendant cites in this connection *American Coast Lines, Inc. v. Commissioner*, 159 Fed. (2d) 665, and *Pohatcong Hosiery Mills v. Commissioner*, 162 Fed. (2d) 146. It should be noted, however, at the outset that these cases are not concerned with what interest is authorized by Section 292 (a) or how interest is to be determined under Section 722.

*River Mills Co. v. United States*, 119 C. Cls. 350, on facts which, in all material respects, were identical with those of the present case. We regard that holding as both correct and controlling here.

The defendant cites and relies upon the cases of *Manning v. Seeley Tube and Box Co.*, 338 U. S. 561, and *Rodgers v. United States*, 123 C. Cls. 779, on the theory that insofar as interest is concerned there is no qualitative distinction between the net operating loss carry-back provisions of Section 122<sup>6</sup> and the application of Section 722. In our opinion these cases are not in point. In

the *Seeley Tube* case, *supra*, the taxpayer filed its return  
37 for 1941 and paid the amount of tax shown thereon. In

1943, after the taxpayer was bankrupt, the Commissioner determined and assessed a deficiency in the 1941 tax with interest from the date the tax was due to the assessment date. The *Seeley Tube and Box Co.* subsequently filed its return for 1943, disclosing a net operating loss for that year. Under the carry-back provisions of the Code this loss was sufficient to abate completely the tax liability for 1941. Upon suit by the taxpayer the Supreme Court held that plaintiff was not entitled to recover the interest previously assessed on the ground that where a deficiency and interest have been validly assessed under any applicable statutory procedure, a subsequent carry-back with an abatement of the deficiency does not abate the interest previously assessed. This holding is as clearly correct as it is inapposite to the case now before us. The Court was dealing there with a situation in which there was no question but that the excess profits tax for 1941, as computed under the only formula available to the taxpayer and with reference to all the economic circumstances of that corporation *in that year*, was underpaid. Also, the tax thus computed was neither "excessive" nor "discriminatory" and no reason existed for any adjustment in the amount exacted until two years after the return was filed and subsequent to the determination and assessment of an admitted deficiency by the Commissioner. The distinction between the "carry-back" provisions and Section 722 is immediately apparent. The former permits an adjustment in a tax which is fair and equitable when imposed, due to unknown and unknowable future economic events which justify relief in a *future taxable period*; the latter affords an alternative mode of computation in the first instance where procedural requirements are met and the economic circumstances of *that taxable year* would give rise to an excessive and discriminatory tax if the usual formula were applied. In other words, given compliance with factual and procedural prerequisites, Section

<sup>6</sup> 26 U. S. C. 122 (b) (1) provides in part that "If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years."

122 is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed. In view of this broad difference in purpose and operation of the two Code provisions and 38 the divergent factual situations involved, *The Seeley Tube and Box Co.* case, *supra*, is clearly of little assistance here. The *Rodgers* case, *supra*, involved essentially the same questions and is equally not in point.

Subsection (d) of Section 722<sup>7</sup> is also employed by defendant as justification for the assessment of interest on potential deficiencies. The requirement of this subsection that the taxpayer "compute its tax, file its return, and pay the tax shown thereon without the application [of § 722]" is urged as showing conclusively that the assessment of interest was proper here. We do not agree. It is our view that the District Court for the Southern District of Florida properly construed this provision in *Kuder Citrus Pulp Co. v. United States*.<sup>8</sup> That court concluded:

\* \* \* that Section [722 (d)] has nothing whatsoever to do with the question of whether or not interest may be assessed upon a deficiency which would exist except for the relief under Section 722. The [sub] Section does no more than recognize the difficulties inherent in determining the amount of relief properly allowable under Section 722. It does no more than notify a taxpayer that it cannot take advantage of Section 722 on the basis of its own determination but must await determination of available relief by the Commissioner. The Section certainly does not forbid retroactive application of the relief when determined by the Commissioner.

The correctness of this construction is supported by the legislative history of the provision. The Committee Reports indicate persuasively that this provision is merely an administrative aid designed to avoid the prolonged delay in payment of *any* excess profits tax, due to the complexities inherent in the application of Section 722.<sup>9</sup> While there is no doubt that 722 (d) could 39 not be ignored, and the taxpayer could not anticipate the applicability of, or apply, Section 722 in its original return, we

<sup>7</sup> 26 U. S. C. 722 (d) provides in part:

*Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in Section 710 (a) (5). \* \* \*

<sup>8</sup> U. S. District Court, S. D. Fla., Tampa Div., No. T-2170, Mar. 16, 1953; 672487, P-H Fed. Serv. 1953.

<sup>9</sup> Both the House and Senate Reports on the bill containing the provision which became subsection (d) of § 722 contain the fol-

are of the opinion that the remedy for its violation or for failure otherwise to file a substantially correct return is to be found in the penalty provisions of the U. S. Code rather than Section 292 (a), under the provisions of which we think, in view of the facts and circumstances of this case, an attempt has been made to exact illegal and unauthorized interest on "potential" deficiencies never "determined" under the statute nor authorized to be asserted by law.<sup>10</sup>

We are not impressed by defendant's argument that failure to allow the assessment of interest on these "potential" deficiencies not recognized by statute or authorized to be assessed when Section 722 is found, under the facts to be applicable, will encourage delay in payment of the taxes by taxpayers. It may be argued with equal cogency that denial to the taxpayer of the right to undertake in its return to apply Section 722 would encourage dilatory investigation, determination and assessment of taxes under this section on requests for application of Section 722.

In the absence of a clear legislative mandate, which we do not find in the statute, we are constrained not to infer a Congressional intent to authorize and provide for the assessment of interest on a purely theoretical amount which would have been exacted only had Congress not expressly prohibited its imposition, denominating it "excessive and discriminatory." A different conclusion could lead only to the sacrifice of a clearly intended and salutary result (determination and assessment under Sec. 722) to the futile quest

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lowing comment: "Administrative procedure: It is deemed advisable in the interest of good administration, in view of the nature of the problem presented by Section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess profits tax liability shown upon its return and that the taxpayer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (e) [(d) in H. Rept.] a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. A taxpayer, in order to obtain the benefits of section 722, must make an application to the Commissioner of Internal Revenue under regulations to be prescribed by the Commissioner \* \* \*. S. Rept. No. 75, 77th Cong., 1st Sess. p. 13, H. Rept. No. 146, same session at p. 13.

<sup>10</sup>On the record before us it would appear that plaintiff's returns as filed reflected substantially the correct amount of tax under the theory on which those returns were made and the tax computed, i. e., Equity Invested Capital. It was only when the "average earnings" method was employed by the Commissioner that the "potential deficiencies" now in question resulted.

for that degree of technical consistency no longer found, or  
40 for that matter required, in Federal revenue legislation.

The parties agree that defendant is entitled to a set-off of \$2,926.85. Judgment will, therefore, be entered in favor of plaintiff in the sum of \$270,216.34 overassessment and overpayment of interest for 1940 and 1941, together with interest thereon as provided by law.

It is so ordered.

WHITAKER, Judge; and JONES, Chief Judge, concur.

MADDEN, Judge, dissenting.

I respectfully dissent from the decision of the court. I think our decision in the *Henry River Mills* case, in which I joined, was wrong.

I see no escape from the mandate of Section 722 (d) of the Internal Revenue Code. It says, of the very situation here under consideration:

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled under the provisions of Section 722 (a), (b), and (c), was worked out between the taxpayer and the Government. The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what  
41 relief the plaintiff was entitled to.

The difference between the instant case and cases like *Manning v. Seelye Tube and Box Co.*, 338 U.S. 561, and *Rodgers v. United States*, 123 C. Cls. 479, in which it was held that interest

was payable on deficiencies later wiped out by the carryback of losses from later years, is, as a practical matter, more apparent than real. To be sure, in the carryback cases the data on which the ultimate determination of the tax must be made are not in existence when the taxpayer files his return. But in the Section 722 cases, while in a sense the facts are in existence, they might as well, in a complicated case, not be in existence, for it is plain that it will take much study and analysis and the exercise of much judgment to make the final determination as to the amount of relief to be granted the taxpayer. And, in the meantime, the statute says, he must pay his tax as if Section 722 were not in existence. Section 3771 (g) of the Internal Revenue Code prohibits the Government from paying interest on overpayments resulting from allowance of Section 722 relief for taxable years prior to January 1, 1942, and for later years prohibits interest for any period prior to one year after the filing of an application for relief, or September 16, 1945, whichever is the later. These provisions show the intention of Congress that the money is intended to be collected and held by the Government, as of right, until the question of Section 722 relief is settled.

#### FINDINGS OF FACT

The court having considered the evidence, the report of Commissioner Richard H. Akers, and the briefs and arguments of counsel, makes findings of fact as follows:

1. (a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The return for 1940 disclosed thereon excess profits net income of \$3,656,110.35, an excess profits credit of \$3,864,935.25, and showed no tax due. The amended return for 1940 disclosed thereon excess profits net income of \$3,653,890.77, an excess profits credit of \$3,623,-  
42 876.29, an adjusted excess profits net income of \$25,014.48, and an excess profits tax liability of \$6,512.76. The tax for 1940 was paid to the Collector at Pittsburgh, \$3,000 on March 15, 1941, \$3,000 on June 13, 1941, and \$512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The return for 1941 disclosed thereon excess profits net income of \$6,-  
613,646.26, an excess profits credit of \$3,494,726.10, an adjusted excess profits net income of \$3,113,920.16, and an excess profits tax liability of \$1,822,352.10. The amended return for 1941 disclosed

thereon excess profits net income of \$6,545,206.33, an excess profits credit of \$3,494,726.10, an adjusted excess profits net income of \$3,045,480.23, and an excess profits tax liability of \$1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

(c) The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code.

2. Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies was included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

3. By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

43 4. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of \$6,000 of the excess profits tax paid for 1940. On September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from \$6,000 to \$22.56. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of \$1,781,288.14 of the excess profits tax paid for 1941. On November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from \$1,781,288.14 to \$541,103.86.

5. On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was \$2,801,598.22, and for the year 1941 was \$3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

6. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' re-

ports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which he proposed excess profits net income, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1940	Proposed excess profits credit 1940	Proposed deficiency in excess profits tax—1940
Sept. 23, 1946 .....	\$4,158,504.30	\$2,612,500.89	\$710,753.85
Mar. 1, 1949 .....	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951 .....	3,280,942.26	2,661,518.31	260,554.39

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits 44 Tax Council. The relief thus allowed increased the excess profits credit for 1940 to \$2,661,518.31, resulting in a decrease in the proposed deficiency in excess profits tax to \$260,554.39.

7. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1941 in which he proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1941	Proposed excess profits credit 1941	Proposed deficiency in excess profits tax—1941
Apr. 29, 1949 .....	\$6,102,978.68	\$2,576,117.11	\$272,078.42
Feb. 9, 1951 .....	6,353,492.13	3,143,429.68	95,749.33

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to \$3,143,429.68, resulting in a decrease in the proposed deficiency in excess profits tax to \$95,749.33.

8. Thereafter and on February 14, 1951, the plaintiff executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of \$260,554.39 and \$95,749.33.

9. In computing the proposed deficiencies set out in the preceding findings, the Commissioner, in accordance with the administrative practice of the Internal Revenue Bureau, first computed the excess profits tax liability for each of the years 1940 and 1941 without the allowance of any relief provided by Section 722. At

that time, February 26 and February 27, 1951, an agreement had been reached between the parties, as shown in findings 6 and 7, both as to the amount of taxable net income and the amount of relief allowable under Section 722. Those computations 45 showed the following results:

	1940	1941
Excess profits net income	\$1,289,332.26	\$6,353,492.13
Excess profits credit	2,261,809.29	2,576,117.11
Adjusted excess profits net income	1,011,133.00	3,772,375.02
Excess profits tax before application of Section 722	166,921.67	2,208,019.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.14
Excess profits tax before application of Section 722 but after allowing credit for payments made with return	160,408.91	426,730.95

10. After the computations referred to in the preceding findings had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 from \$166,921.67 to \$267,967.15, that is, in the amount of \$199,854.52, and for 1941 from \$2,208,019.09 to \$1,877,037.47, that is, in the amount of \$330,981.62. Against the amounts so reduced he gave credit for the excess profits tax reported and paid in the same manner as in the previous computations, that is, \$6,512.76 for 1940 and \$1,781,288.14 for 1941. After the allowance of these credits there was shown a balance of excess profits tax due for 1940 of \$260,554.39 and for 1941 of \$95,749.33. On March 8, 1951, the Commissioner issued his statutory notice of a determination of deficiencies in the amounts just stated, such notice reading in part as follows:

You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, \* \* \* discloses deficiencies of \$260,554.39, \$95,749.33, \* \* \* respectively.

No similar notice was given by the Commissioner with respect to the results of his computation of the excess profits tax liability before the application of Section 722.

11. The Bureau of Internal Revenue computed interest for the years 1940 and 1941 as follows: For the year 1940, interest in the sum of \$217,376.07 was computed upon \$460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of \$260,554.39); and for the year 1941, interest in the sum of \$230,504.86 was computed upon \$426,730.95 for the period beginning March 15, 1942 (which was the due date 46 of the 1941 return), to March 16, 1951 (which was thirty days after the waiver referred to in finding 8 was filed).

12. On April 17, 1951, pursuant to the waiver filed Feb-

ruary 14, 1951, the Commissioner assessed deficiencies in excess profits tax of \$260,554.39 for 1940 and \$95,749.33 for 1941 and at the same time assessed interest of \$217,376.07 for 1940 and \$230,504.86 for 1941. These amounts of tax and interest were paid in full by the plaintiff to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand.

13. On June 29, 1951, the plaintiff timely filed a formal claim for refund of part of the interest which had been assessed and paid for the years 1940 and 1941, as stated above. It claimed refunds of \$94,358.71 for 1940 and \$178,784.48 for 1941, or such greater amounts as legally might be due. Each claim for refund set forth as a ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292 (a) of the Internal Revenue Code. Each claim said in part:

The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed.

The plaintiff concedes that the remaining interest to the extent of \$123,017.36 was properly assessed on the deficiency for 1940 (six percent on \$260,554.39 from 3/15/41 to 1/28/49) and that the remaining interest to the extent of \$51,720.38 was properly assessed on the deficiency for 1941 (six percent on \$95,749.33 from 3/15/42 to 3/16/51).

14. On December 13, 1951, the Commissioner sent to the plaintiff by registered mail a statutory notice of disallowance of each of its claims for refund.

15. The plaintiff concedes that the set-off in the amount of \$2,926.85, alleged by the defendant in paragraph IV of its Answer, is a proper set-off, and that if it is entitled to recover the amount of \$273,143.19 claimed in its petition, then that amount should be reduced by the sum of \$2,926.85 and judgment entered for the difference.

47-48

#### CONCLUSION OF LAW

Upon the foregoing findings of fact which are made a part of the judgment herein, the court concludes that, as a matter of law, the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two hundred seventy thousand, two hundred sixteen dollars and thirty-four cents (\$270,216.34), together with interest thereon as provided by law.

50

In the United States Court of Claims

No. 78-52

**KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES.**

v.

**THE UNITED STATES****PROCEEDINGS BEFORE COMMISSIONER AKERS—Jan. 12, 1953**

The parties met in Commissioner Akers' office in the United States Court of Claims Building, Washington, D. C., at 10:30 a. m. on January 12, 1953.

Present:

**HON. RICHARD H. AKERS**, Commissioner;  
**DAVID W. RICHMOND**, Esq., counsel for plaintiff;  
**JOHN A. REES**, Esq., counsel for defendant.

**COMMISSIONER AKERS**: At the call of the Calendar this morning and after an indication by the parties that there was a disagreement between them on questions of fact, as shown by the affidavits which had been filed in connection with motions for summary judgment, the Court referred the matter to me for the purpose of allowing the parties to submit their evidence in support of the motions and have me prepare a report of facts to the Court.

51       **Mr. RICHMOND**: As to the affidavits of the plaintiff appearing at pages 21 to 23, both inclusive, of the record, it is stipulated that if Mr. R. E. Gray were called as a witness he would testify in accordance with said affidavits.

**Mr. REES**: Counsel also agree that separate affidavits subscribed and sworn to by Arthur L. Guess and Richard R. McLaughlin on December 31, 1952, represent the testimony these gentlemen would give if they were called as witnesses for the defendant and properly sworn at a hearing before Commissioner Akers.

**Mr. RICHMOND**: While we do agree that if Mr. Guess and Mr. McLaughlin were called to testify they would testify in accordance with the affidavits already submitted, we reserve the right to argue that the words "deficiency" and "determination", as used in these affidavits, are conclusions of law and not facts.

**COMMISSIONER AKERS**: With that reservation, you are willing to have the affidavits stand as the testimony which these witnesses would give if they were called?

**Mr. RICHMOND**: Yes, sir.

**COMMISSIONER AKERS**: And with respect to the affidavit referred to by Mr. Richmond, I assume that you are willing to accept that

affidavit as the testimony which that witness would give if  
52 called to testify.

Mr. REES: Yes.

COMMISSIONER AKERS: With the submission of these affidavits does that, with the pleadings, constitute the entire proof which both parties desire to have submitted in this action in connection with the motions for summary judgment?

Mr. RICHMOND: Yes.

Mr. REES: I wish to offer in evidence uncertified photostatic copies of the exhibits which are attached to the affidavit of Mr. McLaughlin.

COMMISSIONER AKERS: I had understood on that Mr. Rees that the exhibits which were attached to the affidavits as submitted by you would be considered as a part of the exhibit.

Mr. REES: With that understanding Mr. Commissioner, I withdraw my offer.

Mr. RICHMOND: That is our understanding also.

COMMISSIONER AKERS: The record as now made would be sufficient so far as both of you are concerned for the submission of the case on findings to be prepared by me?

Mr. REES: Yes.

Mr. RICHMOND: Yes. Does your Honor want proposed findings from us? I presume so.

53 COMMISSIONER AKERS: Plaintiff is given until January 15, 1953, within which to file its proposed findings of fact, and defendant is given until January 19, 1953, within which to make comments on or objections to plaintiff's proposed findings or to submit substitute findings.

Trial adjourned.

[Reported by Mildred Trotter]

54 In the United States Court of Claims

[Title omitted]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed Jan. 9, 1953

CITY OF WASHINGTON,

Dist. of Columbia, ss:

Richard R. McLaughlin, full age, being duly sworn and on his oath according to law, deposes and says:

That he is now an Abnormality Claims Reviewer in the Collection Division, Bureau of Internal Revenue, Department of the Treasury,

and as such has custody of the Bureau's administrative files containing the records of Koppers Company, Inc., for its tax years ending December 31, 1940 and 1941.

That his duties now, and for the past seven years, have included the examination of the records of taxpayers and of the Bureau, as contained in the Bureau's administrative files in those cases in which are involved relief under section 722, Internal Revenue Code, to ascertain the interest owed to taxpayers by the United States and interest owed by taxpayers to the United States following determinations made by the Commissioner of Internal Revenue and adjustments made by him in connection with liabilities of taxpayers for income and declared value excess profits and excess profits taxes. Duties include the determination of the interest applicable to overpayments or deficiencies attributable to adjustments

55 involving relief under the provisions of Section 722 of the Internal Revenue Code.

In making interest determinations it is the administrative practice of the Bureau (A) to allow a taxpayer interest on all overpayments resulting from a reduction in income or excess profits taxes due to standard adjustments other than those arising from relief provisions including Section 722, and (B) to charge a taxpayer interest on all deficiencies resulting from increases in income or excess profits taxes due to adjustments other than those arising from such relief provisions. In cases where all or any part of an excess profits tax deficiency resulting from standard adjustments determined without the application of Section 722 relief is extinguished by the application of such relief, it is the Bureau policy to assess only the net deficiency together with interest on the entire deficiency from the date the return is due until the appropriate terminal date. This includes interest on the portion of the deficiency extinguished by relief under section 722.

The usual administrative procedure of the Bureau in any case where proper application is made for relief under Section 722 is first to determine the correct tax liability which should have been computed, returned and paid as provided in Section 722(d); second to ascertain the amount of relief allowable and make appropriate adjustments; third to determine the net deficiency to be assessed and collected or the overpayment to be refunded; and fourth to determine the interest due on any deficiency or on any overpayment resulting from standard adjustments other than Section 722 relief. This procedure of the Bureau of Internal Revenue was followed in the case of Koppers Company, Inc., for the taxable years ended

December 31, 1940 and 1941.

56 Koppers United Company, hereinafter referred to as the taxpayer, was the parent company of a group of corpora-

tions which filed consolidated returns of federal excess profits tax on Treasury Form 1121 for the calendar years 1940 and 1941 with the Collector of Internal Revenue at Pittsburgh, Pennsylvania. These corporations were merged into Koppers Company, Inc., by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds at New Castle, Delaware, on November 10, 1944.

The taxpayer's 1940 return was filed on September 15, 1941, reporting an excess profits net income of \$3,656,110.35, an excess profits credit of \$3,864,935.25, and showed no tax due. On July 21, 1944, an amended 1940 return was filed showing an excess profits net income of \$3,653,890.77, an excess profits credit of \$3,623,876.29, an excess profits net income of \$25,014.48, and reported a tax liability of \$6,512.76. This sum was timely assessed and paid.

The taxpayer's 1941 return was filed on June 15, 1942. It reported an excess profits net income of \$6,613,646.26, an excess profits credit of \$3,494,726.10, an excess profits net income of \$3,113,920.16, and an excess profits tax liability of \$1,822,352.10. On June 20, 1942, an amended return was filed for 1941 reporting an excess profits net income of \$6,545,206.33, an excess profits credit of \$3,494,726.10, an excess profits net income of \$3,045,480.23, and an excess profits tax liability of \$1,781,288.14. This sum was timely assessed and paid.

The returns mentioned in the two paragraphs next above were made and the tax reported thereon was purportedly computed without the application of Section 722 of the Internal Revenue Code. Photostat copies of each return, marked Exhibits A, B, C and D, respectively, are attached.

On September 15, 1943, the taxpayer filed an application for relief under Section 722 of the Code claiming thereon a refund of \$6,000 of the excess profits tax paid for the year 1940. On September 10, 1945, an amended application was filed reducing the amount claimed as a refund for 1940 to \$22.56. On September 15, 1943, an application was filed for relief under section 722 claiming a refund of the full amount paid as excess profits tax for the year 1941. On November 20, 1945, an ammended application was filed for 1941 reducing the amount claimed as a refund to \$541,103.86. Photostat copies of the four applications, marked Exhibits E, F, G and H, respectively, are attached.

Thereafter and on final audit of the taxpayer's 1940 and 1941 returns in the Bureau of Internal Revenue, in accordance with the administrative practice shown above, it was first determined that the correct excess profits tax liability which should have been re-

turned and paid without the benefit of any relief provided in Section 722 was as follows:

	1940	1941
Excess profits net income .....	\$3,280,942.26	\$6,353,492.13
Excess profits credit .....	2,261,809.26	2,576,117.11
Adjusted excess profits net income .....	1,014,133.00	3,772,375.02
Excess profits tax liability .....	466,921.67	2,208,019.09
Excess profits tax deficiency .....	460,408.91	426,730.95

Photostat copies of the original Bureau determinations, marked Exhibits I and J, are attached.

The Commissioner of Internal Revenue adopted as his own determination the determinations made in the final audit of the taxpayer's returns for the calendar years 1940 and 1941, as stated in the paragraph next above, and the Commissioner thereupon correctly determined that the taxpayer's excess profits taxes for the year 1940, computed without the application of Section 722, was in the amount of \$466,921.67 and for the year 1941 was in the amount of \$2,208,019.09.

The Commissioner further correctly determined that before application of Section 722 relief there was a deficiency in the taxpayer's 1940 excess profits taxes in the amount of \$460,408.91 and in its 1941 excess profits taxes in the amount of \$426,730.95.

58 The Commissioner further correctly determined that after application of Section 722 relief there was an unextinguished deficiency in the taxpayer's 1940 excess profits taxes in the amount of \$260,554.39 and in its 1941 excess profits taxes in the amount of \$95,749.33.

Thereafter and on February 14, 1951, Koppers Company, Inc., executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of \$260,554.39 and \$95,749.33. A photostat copy of this waiver is attached and marked Exhibit K.

Interest was computed on the excess profits tax deficiencies for the years 1940 and 1941, determined by the Commissioner as set forth above, as follows: For the years 1940, interest in the sum of \$217,376.07 was computed upon \$460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the net deficiency of \$260,554.93); and for the year 1941, interest in the sum of \$230,504.86 was computed upon \$426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was thirty days after the waiver—Exhibit K was filed).

On April 17, 1951, pursuant to the waiver filed February 14, 1951

(Exhibit K), the Commissioner of Internal Revenue assessed deficiencies in the excess profits tax of \$260,554.39 for 1940 and \$95,749.33 for 1941 and at the same time assessed interest of \$217,376.07 for 1940 and \$230,504.86 for 1941. These amounts of tax and interest were paid in full by Koppers Company, Inc., to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand. Photostat copies of registered letter dated March 8, 1951, marked Exhibit L, and of the assessment List, marked Exhibit M, are attached.

On June 29, 1951, Koppers Company, Inc., filed with the Collector claims for refund on Treasury Form 843 for part of the interest paid as stated in the paragraph next above. Photostat copies of separate claims filed for 1940 and for 1941, marked Exhibits O and P respectively, are attached. The 1940 claim asked a refund of \$94,358.71 and the 1941 asked a refund of \$178,784.48, or such greater amounts as legally might be due.

On December 13, 1951, the Commissioner of Internal Revenue sent Koppers Company, Inc., by registered mail a statutory notice of the disallowance of each of its claims for refund.

(S.) RICHARD R. McLAUGHLIN.

Subscribed and sworn to before me this 31st day of December, 1952.

(S.) Erma W. Dudley, Notary Public.

My commission expires June 14, 1956.

60

#### EXHIBIT "I" TO AFFIDAVIT

##### INSTRUCTIONS

10. The amounts shown in Column (J) represent the adjustments to the taxes previously assessed after giving effect to all adjustments shown in the preceding columns, and are not to be used for the purpose of determining the amounts of interest to be assessed or allowed. The deficiencies or overassessments shown in Columns (A) to (I), inclusive will not be separately assessed or allowed but are reflected in the final determination set forth in Column (J).

11. This form is to be prepared for a taxable year in which any of the following adjustments are involved:

- (a) Concurrent adjustments resulting from the application of the general provisions of law (Column (A)) and some one or several of the specific sections of law on which interest is restricted (Columns (B) to (D), inclusive).
- (b) Net operating loss carry-backs from two succeeding years.

- (c) Section 722 adjustments.
- (d) Unused excess profits credit carry-back adjustments, either under section 710(e) or section 722.

(Here follows 1 photo, folio 61.)

NOT TO BE CORRECTED OR DESTROYED AFTER ADMINISTRATIVE ACTION BY THE CLEARING DIVISION. ATTACH CORRECTED FORMS.

1. ADMINISTRATIVE  
OR CORRECTED FORMS.

	(Plumb line year)							
	(A) General adjustments and amortization of facilities re- quired sub- sequent to June 10, 1940	(B) Other adjust- ments: Interest re- stricted under: See _____ INC See _____ INC	(C) Net operating loss carry- back adjust- ment from year 1st year Claim filed:	(D) Net operating loss carry- back adjust- ment from year 2nd year Claim filed:	(E)	(F) Unused excess profits credit carry-back adjustment from year 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr year 1st year Claim filed:	(H) Unused excess profits credit carry-back adjustment from year 2nd year Claim filed:
1. Net income for PWD tax computation								
2. Net adjustments								
3. Corrected balance subject to PWD tax								
4. PWD tax								
5. PWD tax previously determined								
6. Deficiency or (overassessment)								
7. Tentative adjustment deficiency or (O.A.)								
8. Net deficiency or (overassessment)								
9. Adjusted net income for income tax purposes								
10. Net adjustments								
11. Corrected adjusted net income								
12. Losses: Excess profits tax or								
13. Income subject to excess profits tax								
14. Dividends received credit								
15. Corrected dividends net income								
16. Income tax								
17. Income tax previously determined								
18. Deficiency or (overassessment)								
19. Tentative adjustment deficiency or (O.A.)								
20. Net deficiency or (overassessment)								
21. Excess profits net income	25	3,653,890.77			3,280,742.10			3,280,742.10
22. Net adjustments		3,72,998.51						
23. Corrected excess profits net income		3,280,942.10						
24. Losses: Specific amortization		5,000			5,000			5,000
25. Excess profits credit		2,261,897.14			2,661,518.30			2,661,518.30
26. Unused excess profits credit								
27. Corrected corrected excess profits net income		1,017,133.00			614,433.90			614,433.90
28. Income tax		461,066.54			267,211.74			267,211.74
29. Section 722(a)(3) Adjustment								
30. Profits tax loss credit		5,855.12						5,855.12
31. Profits tax loss credit		466,921.67			267,067.15			267,067.15
32. Income tax previously determined		6,512.76			766,941.62			766,941.62
33. Deficiency or (overassessment)		960,408.91			< 199,854.52 >			199,854.52
34. Tentative adjustment deficiency or (O.A.)								
35. Net deficiency or (overassessment)								

Amounts representing overassessments should be enclosed in parentheses.  
Changes will be made in the Clearing Division as required.

① Consolidated for excess profits tax  
no change in income tax

Prepared by C.R. Date 8-26-58  
Form 1288 and 1479 prepared by IP&CIO&C Date \_\_\_\_\_  
IP&G&R Date \_\_\_\_\_

	(Plumb line year ended)									
	(A) General adjustments and amortization of facilities re- quired sub- sequent to June 10, 1940	(B) Other adjust- ments: Interest re- stricted under: See _____ INC See _____ INC	(C) Net operating loss carry- back adjust- ment from year 1st year Claim filed:	(D) Net operating loss carry- back adjust- ment from year 2nd year Claim filed:	(E)	(F) Unused excess profits credit carry-back adjustment from year 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr year 1st year Claim filed:	(H) Unused excess profits credit carry-back adjustment under Sec. 722 from yr year 2nd year Claim filed:	(I) Unused excess profits credit carry-back adjustment under Sec. 722 from yr year 1st year Claim filed:	(J) After all adjustments
1. Net income for PWD tax computation										
2. Net adjustments										
3. Corrected balance subject to PWD tax										
4. PWD tax										
5. PWD tax previously determined										
6. Deficiency or (overassessment)										
7. Tentative adjustment deficiency or (O.A.)										
8. Net deficiency or (overassessment)										
9. Adjusted net income for income tax purposes										
10. Net adjustments										
11. Corrected adjusted net income										
12. Losses: Excess profits tax or										
13. Income subject to excess profits tax										
14. Dividends received credit										
15. Corrected dividends net income										
16. Income tax										
17. Income tax previously determined										
18. Deficiency or (overassessment)										
19. Tentative adjustment deficiency or (O.A.)										
20. Net deficiency or (overassessment)										
21. Excess profits net income	25	3,653,890.77			3,280,742.10			3,280,742.10		
22. Net adjustments		3,72,998.51								
23. Corrected excess profits net income		3,280,942.10								
24. Losses: Specific amortization		5,000			5,000			5,000		
25. Excess profits credit		2,261,897.14			2,661,518.30			2,661,518.30		
26. Unused excess profits credit										
27. Corrected corrected excess profits net income		1,017,133.00			614,433.90			614,433.90		
28. Income tax		461,066.54			267,211.74			267,211.74		
29. Section 722(a)(3) Adjustment										
30. Profits tax loss credit		5,855.12								
31. Profits tax loss credit		466,921.67			267,067.15			267,067.15		
32. Income tax previously determined		6,512.76			766,941.62			766,941.62		
33. Deficiency or (overassessment)		960,408.91			< 199,854.52 >			199,854.52		
34. Tentative adjustment deficiency or (O.A.)										
35. Net deficiency or (overassessment)										

Amounts representing overassessments should be enclosed in parentheses.  
Changes will be made in the Clearing Division as required.

① Consolidated for excess profits tax  
no change in income tax

Prepared by C.R. Date 8-26-58  
Form 1288 and 1479 prepared by IP&CIO&C Date \_\_\_\_\_  
IP&G&R Date \_\_\_\_\_

## EXHIBIT "J" TO AFFIDAVIT

## INSTRUCTIONS

10. The amounts shown in Column (J) represent the adjustments to the taxes previously assessed after giving effect to all adjustments shown in the preceding columns, and are not to be used for the purpose of determining the amounts of interest to be assessed or allowed. The deficiencies or overassessments shown in Columns (A) to (I), inclusive, will not be separately assessed or allowed but are reflected in the final determination set forth in Column (J).

11. This form is to be prepared for a taxable year in which any of the following adjustments are involved:

- (a) Concurrent adjustments resulting from the application of the general provisions of law (Column (A)) and some one or several of the specific sections of law on which interest is restricted (Columns (B) to (I), inclusive).
- (b) Net operating loss carry-backs from two succeeding years.
- (c) Section 722 adjustments.
- (d) Unused excess profits credit carry-back adjustments, either under section 710(o) or section 722.

BE CORRECTED OR DESTROYED AFTER ADMINISTRATIVE  
ACTION BY THE CLEARING DIVISION. ATTACH CORRECTED FORMS.

AFTER ADMINISTRATIVE  
ACTION CORRECTED FORMS.

	(Fiscal year)									
	(A) General adjustments and amortization of facilities ac- quired sub- sequent to June 10, 1940	(B) Other adjust- ments: Interest re- stricted under: See _____ INC	(C) Net operating loss carry- back adjust- ment from year _____ 1st year Claim filed:	(D) Net operating loss carry- back adjust- ment from year _____ 2nd year Claim filed:	(E) Section 722 adjustments filed:	(F) Unused excess profits credit carry-back adjustment from year _____ 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 1st year Claim filed:	(H) Unused excess profits credit carry-back adjustment f adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:	(I) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:	(J) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:
1. Net income for DVEP tax computation										
2. Net adjustments										
3. Corrected balance subject to DVEP tax										
4. DVEP tax										
5. DVEP tax previously determined										
6. Deficiency or (overassessment)										
7. Tentative adjustment deficiency or (O.A.)										
8. Net deficiency or (overassessment)										
9. Adjusted net income for income tax purposes										
10. Net adjustments										
11. Corrected adjusted net income										
12. Loss: Excess profits tax or										
13. Income subject to excess profits tax										
14. Dividends received credit										
15. Corrected current-tax net income										
16. Income tax										
17. Income tax previously determined										
18. Deficiency or (overassessment)										
19. Tentative adjustment deficiency or (O.A.)										
20. Net deficiency or (overassessment)										
21. Excess profits net income	6,545,206.31					6,353,492.18				
22. Net adjustments										
23. Corrected excess profits net income	6,353,492.18									
24. Loss: Specific deduction	5,000									
25. Excess profits credit	2,576,117.11					2,143,429.68				
26. Unused excess profits credit										
27. Corrected adjusted excess profits net income	3,772,375.01					3,205,062.48				
28. Excess profits tax	2,217,425.01					1,877,037.47				
29. Section 722(e)(5) deferral										
30. Section 722(e)(5) credit										
31. Excess profits tax loss credits	2,208,019.09					9,059.92 FURNISH TAX -				
32. Excess profits tax loss credits determined	1,781,318.19					1,877,037.47				
33. Deficiency or (overassessment)	726,730.95					- CREDIT 2,208,019.09				
34. Tentative adjustment deficiency or (O.A.)						( 30,981.62 )				
35. Net deficiency or (overassessment)										

Amounts representing overassessments should be enclosed in parentheses.  
Changes will be made in the Clearing Division as required.

Consolidated for excess profits tax  
Form 1280 and 1470 prepared by \_\_\_\_\_  
Separate returns filed for income tax -  
- See attached M-884 for income tax  
Revised December 1940

Prepared by 213 Date 1-1-51  
Form 1280 and 1470 prepared by \_\_\_\_\_  
ENCLOSURE Date \_\_\_\_\_  
ENCLAS Date \_\_\_\_\_  
ACCURACY OF FORMS  
SHOWN ON EXHIBIT

	(Fiscal year ended)									
	(A) General adjustments and amortization of facilities ac- quired sub- sequent to June 10, 1940	(B) Other adjust- ments: Interest re- stricted under: See _____ INC	(C) Net operating loss carry- back adjust- ment from year _____ 1st year Claim filed:	(D) Net operating loss carry- back adjust- ment from year _____ 2nd year Claim filed:	(E) Section 722 adjustments filed:	(F) Unused excess profits credit carry-back adjustment from year _____ 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 1st year Claim filed:	(H) Unused excess profits credit carry-back adjustment f adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:	(I) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:	(J) Unused excess profits credit carry-back adjustment under Sec. 722 from yr See. 722 from yr 2nd year Claim filed:
1. Net income for DVEP tax computation										
2. Net adjustments										
3. Corrected balance subject to DVEP tax										
4. DVEP tax										
5. DVEP tax previously determined										
6. Deficiency or (overassessment)										
7. Tentative adjustment deficiency or (O.A.)										
8. Net deficiency or (overassessment)										
9. Adjusted net income for income tax purposes										
10. Net adjustments										
11. Corrected adjusted net income										
12. Loss: Excess profits tax or										
13. Income subject to excess profits tax										
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15. Corrected current-tax net income										
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34. Tentative adjustment deficiency or (O.A.)						( 30,981.62 )				
35. Net deficiency or (overassessment)										

As should be enclosed in parentheses.  
and Division as required.  
dated for excess profits tax  
Form 1280 and 1470 prepared by \_\_\_\_\_  
ENCLOSURE Date \_\_\_\_\_  
ENCLAS Date \_\_\_\_\_  
ACCURACY OF FORMS  
SHOWN ON EXHIBIT

## In the Supreme Court of the United States

October Term, 1953

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

*v.*

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES, RESPONDENT

## STIPULATION AS TO PRINTING RECORD

It is hereby stipulated and agreed, by and between counsel for the respective parties to the above-entitled cause, that, for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, only the following portions of the record shall be printed:

- I. Petition.
- II. Answer
- III. Amended answer.
- IV. Proceedings following filing of defendant's answer.
- V. Report of the Commissioner.
- VI. Argument and submission of case.
- VII. Opinion of the Court by Littleton, Judge, findings of fact and conclusions of law.
- VIII. Proceeding before Commissioner Akers January 12, 1953.
- IX. Affidavit of Richard A. McLaughlin in support of defendant's (the United States) motion for summary judgment.
- X. Exhibit "I" in support of affidavit—original Bureau computation of correct excess profits tax liability of Koppers United Company for 1940.
- 65 XI. Exhibit "J" in support of affidavit—original Bureau computation of correct excess profits tax liability of Koppers United Company for 1941.

It is further stipulated and agreed that the parties hereto may refer in the petition for writ of certiorari, briefs and arguments to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

(S.) ROBERT L. STERN,

*Acting Solicitor General,**Counsel for the Petitioner.*

(S.) DAVID W. RICHMOND,

*Counsel for the Respondent.*

Supreme Court of the United States

No. 609, October Term, 1953

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED  
COMPANY AND SUBSIDIARIES

*Order allowing certiorari*

Filed May 17, 1954

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.